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No. 05-785

In the Supreme Court of the United States

THOMAS L. CAREY, WARDEN, PETITIONER,

v.

MATHEW MUSLADIN, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE STATES OF ILLINOIS, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, INDIANA, IOWA, MISSISSIPPI, MONTANA, NEW MEXICO, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased?

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INTEREST OF THE *AMICI CURIAE*

This case asks whether a federal court may grant habeas relief to a state prisoner where the federal law that the state court purportedly misapplied is an opinion of a federal court of appeals. The answer to that question is No.

The Antiterrorism and Effective Death Penalty Act (AEDPA) strictly limits the grounds on which a federal habeas court may disturb a state conviction or sentence. A state court's misapplication of federal law warrants habeas relief only if the court's decision is contrary to or unreasonably applies "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In areas where this Court's precedents announce only general standards, as opposed to specific rules, § 2254(d)(1) affords state courts substantial latitude to interpret and apply those precedents in specific cases.

Disregarding the text of § 2254(d)(1) and this Court's interpretation thereof, the Ninth Circuit held that the source of "Federal law" against which state court decisions are evaluated includes not only this Court's holdings, but also the opinions of lower federal courts. The Ninth Circuit's ruling offends the *amici* States' core interests in the administration of their criminal justice systems and the finality of their criminal proceedings, and demeans state courts by presuming them less willing or able to apply federal law faithfully.

STATEMENT

State courts are as capable as federal courts of interpreting and applying the Constitution. See *Moore v. Sims*, 442 U.S. 425, 430 (1979) (observing that this Court has "repeatedly and emphatically rejected" notion that "state courts [are] not competent to adjudicate federal constitutional claims"). Consistent with this principle, AEDPA strictly limits the power of federal habeas courts to disturb state court judgments for

alleged legal error. Such error is grounds for granting habeas relief only if the state court decision is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Ninth Circuit failed to heed this deferential standard in this case.

1. Respondent Matthew Musladin was charged with murdering Thomas Studer, attempting to murder Pamela Musladin, assaulting Michael Albaugh with a deadly weapon, and burglary. Pet. App. 55a. Before opening statements, defense counsel moved the trial court to direct members of Studer's family to remove buttons featuring Studer's photograph. *Id.* at 73a-74a; J.A. 3-4. The trial court denied the motion, reasoning that there was "no legend on the buttons" and finding "no possible prejudice" to Musladin. J.A. 4; Pet. App. 73a-74a. The jury convicted Musladin on all counts. Pet. App. 55a.

2. Musladin appealed, claiming that the trial court's order violated his due process right to a fair trial. Although the record did not indicate "the size of the buttons, the number of Studer family members wearing the challenged buttons on subsequent days of the trial, [or] whether the jurors could even see and recognize the photo button[s] as depicting the murder victim," Pet. App. 74a, the state appellate court addressed the merits of Musladin's claim. The court recognized that to prevail, Musladin had to "show either actual or inherent prejudice" arising from the trial court's order. *Ibid.* (citing *Holbrook v. Flynn*, 475 U.S. 560, 570 (1986)). Musladin did not claim "actual" prejudice, so the court therefore invoked the standard for cases involving allegedly "inherent" prejudice—"'whether an unacceptable risk is presented of impermissible factors coming into play.'" Pet. App. 74a (quoting *Woods v. Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991) (which in turn quoted *Flynn*, 475 U.S. at 570)).

The state appellate court held that Musladin failed to meet this standard. In so holding, the court distinguished *Norris v. Risley*, 918 F.2d 828 (9th Cir. 1990), in which spectators at a rape trial wore buttons bearing a "Women Against Rape" legend. Pet. App. 74a-75a. The Ninth Circuit in *Norris* granted habeas relief on the ground that "the button's message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the presumption of innocence." *Norris*, 918 F.2d at 831. The appellate court concluded that the buttons worn at Musladin's trial were materially different: "The simple photograph of Tom Studer was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member." Pe App. 75a.

3. The state supreme court denied Musladin's petition for review, and subsequently denied his petition for writ of habeas corpus. Pet. App. 79a-81a.

4. Musladin sought habeas relief in federal court, reiterating his claim that the state trial court's refusal to prohibit Studer's family members from wearing their buttons violated due process. Pet. App. 46a-49a. At that point, the factual record was more developed than it had been in the state appellate court. See J.A. 6-8 (declarations filed by Musladin's mother and trial counsel to support petition for writ of habeas corpus in state supreme court). The district court observed that three members of Studer's family wore the buttons at trial, that each button was "two to four inches in diameter," and that the family members sat "directly behind the prosecution and next to the jury." Pet. App. 48a.

The district court recognized that Musladin, to be entitled to habeas relief, had to show that the state appellate court's decision was "'contrary to, or involve[d] an unreasonable

application of, clearly established [F]ederal law, as determined by the Supreme Court of the United States.'" Pet. App. 32a (quoting 28 U.S.C. § 2254(d)(1)). The district court sought guidance from this Court's decision in *Flynn*, as had the state court, and from *Estelle v. Williams*, 425 U.S. 501 (1976), which found "an unacceptable risk of impermissible factors coming into play" when a criminal defendant appeared in court dressed in prison garb. Pet. App. 48a. The district court recognized that *Williams* involved different facts, and that "[t]he United States Supreme Court has not specifically addressed the issue of buttons in a trial courtroom." *Ibid.* Like the state appellate court, moreover, the district court concluded that the Ninth Circuit's decision in *Norris* was distinguishable, as was *Williams*: "In both [*Williams*] and *Norris*, the challenged practice related directly to the respective defendant's guilt," whereas the buttons bearing Studer's image communicated a "solidarity by the victim's family" that "did not necessarily undermine the presumption of innocence." *Id.* at 49a. Accordingly, the district court held that the state appellate court's decision neither was contrary to nor unreasonably applied federal law. *Id.* at 49a.

5. A divided panel of the Ninth Circuit reversed. Pet. App. 1a-18a. The majority began with the same broad legal principle on which the state appellate court and the federal district court had relied, *i.e.*, to prevail on his due process claim, Musladin had to show an "'unacceptable risk of impermissible factors coming into play'" at his trial. *Id.* at 6a (citing *Williams* and *Flynn*). After summarizing the facts of *Williams* and *Flynn*—which rejected a challenge to "four uniform state troopers sitting in the front row" at trial—the Ninth Circuit turned to its own prior decision in *Norris*. *Id.* at 7a-8a.

The panel concluded that *Norris* had "persuasive value" in two respects: *Norris* could be used to divine "the meaning of the federal law that was clearly established by *Williams* and

Flynn," and also to determine "whether the state court's application of that [clearly established] law . . . [was] objectively unreasonable." *Id.* at 7a. In the panel's view, because *Norris* bore "striking factual similarities" to Musladin's case and could not "reasonably be distinguished," *id.* at 9a, 13a, the state appellate court's decision did not satisfy § 2254(d)(1).

Judge Thompson dissented. Pet. App. 15a-18a. Unlike the majority, Judge Thompson found *Norris* readily distinguishable and saw little threat to Musladin from the presence of the buttons at trial.

6. The Ninth Circuit, with seven judges dissenting, denied Musladin's petition for *en banc* review. Pet. App. 20a-30a. The dissenters criticized the panel for using the Ninth Circuit's own decision in *Norris* as a source of "clearly established Federal law," explaining that such use effectively "eras[ed] the statutory phrase 'as determined by the Supreme Court of the United States'" from § 2254(d)(1). *Id.* at 20a.

SUMMARY OF ARGUMENT

The Ninth Circuit's error was twofold, corresponding to the two ways in which the court employed its own decision in *Norris*. First, as a court of appeals decision, *Norris* is not part of the "Federal law" against which state court judgments are evaluated on federal habeas review, as AEDPA limits "Federal law" to this Court's holdings. 28 U.S.C. § 2254(d)(1). Where, as here, this Court has announced the governing constitutional standard only in general terms, state courts have broad latitude to interpret and apply that standard in individual cases. Federal habeas courts may not use lower court decisions to cabin state court decisionmaking beyond the limits imposed by this Court's actual holdings.

Second, the Ninth Circuit erred by extracting from *Norris* the conclusion that the state appellate court unreasonably

applied this Court's precedents. Even if *Norris* conflicted with the state appellate court's holding—and it did not—that by itself does not make the state court's holding objectively unreasonable under § 2254(d)(1).

Amici States respectfully urge this Court to reverse the Ninth Circuit's judgment and reaffirm § 2254(d)(1)'s clear mandate that only this Court's holdings define "clearly established Federal law" on habeas review. The Court should also make clear that the presence of a contrary lower court decision cannot possibly show that the challenged state court decision unreasonably applied federal law within the meaning of § 2254(d)(1).

ARGUMENT

The Ninth Circuit committed two fundamental errors in granting habeas relief. First, the court ignored AEDPA's plain language by treating one of its own prior opinions as part of the "clearly established Federal law" against which state court decisions are evaluated on federal habeas review. Second, and relatedly, the panel used the same Ninth Circuit opinion as conclusive evidence that the state court unreasonably applied this Court's holdings. Under the proper standard, habeas relief should have been denied.

I. The Term "Clearly Established Federal Law" In 28 U.S.C. § 2254(d)(1) Is Limited To The Holdings Of This Court.

In *Estelle v. Williams*, 425 U.S. 501 (1976), and *Holbrook v. Flynn*, 475 U.S. 560 (1986), this Court established the general principle "that certain practices attendant to the conduct of a trial can create such an 'unacceptable risk of impermissible factors coming into play,' as to be 'inherently prejudicial' to a criminal defendant." Pet. App. 6a (citing *Williams* and *Flynn*).

This is the only "clearly established Federal law" governing Musladin's claim on federal habeas review.

The Ninth Circuit, however, assigned "persuasive value" to its own decision in *Norris* in "assess[ing] . . . the meaning of the federal law that was clearly-established by *Williams* and *Flynn*." Pet. App. 7a. The panel detailed the facts and reasoning of *Norris* under the heading, "Clearly Established Federal Law," and concluded that "the state court's unreasonable application of federal law [was] its misapplication of the *Williams* test, as it was explained in *Norris*, to the facts of this case." *Id.* at 8a-9a.

In short, the Ninth Circuit considered its holding in *Norris* to be part of the governing body of "clearly established" law that may be applied on federal habeas review. This misuse of circuit precedent ignores the plain language of § 2254(d)(1) and disregards this Court's habeas jurisprudence, which affords state courts particular latitude where, as here, they apply broad standards set forth in this Court's precedents.

A. Circuit Precedent Is Not "Clearly Established Federal Law."

AEDPA strictly defines the grounds for disturbing a state criminal judgment. When a habeas petitioner alleges that the state court committed legal error, § 2254(d)(1) prohibits federal courts from granting relief unless the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1) (emphasis added). This Court has read the italicized limitation to mean what it quite clearly says. See, *e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) ("In other words, 'clearly established Federal law' . . . is the governing legal principle or principles *set forth by the Supreme Court* at the time the state court renders its decision.") (emphasis added); *Williams v. Taylor*, 529 U.S. 362, 413 (2000)

("Under the 'unreasonable application clause, a federal court identifies the correct governing legal principle *from this Court's decisions* but unreasonably applies that principle to the facts of the prisoner's case.") (emphasis added).

It is thus beyond dispute that this Court's decisions alone determine the content of "Federal law" for purposes of habeas review. Indeed, "clearly established Federal law" refers only to the "*holdings*, as opposed to the dicta" of this Court's decisions. *Williams*, 529 U.S. at 412 (emphasis added). And the *establishment* of such holdings must be "clear"—meaning that the holding cannot be amorphous or case-specific. See generally Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law under the Antiterrorism and Effective Death Penalty Act*, 54 Cath. U. L. Rev. 747 (2005).

These principles comport with AEDPA's purposes. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, . . . and to further the principles of comity, finality, and federalism." *Woodward v. Garceau*, 538 U.S. 202, 206 (2003) (internal quotation marks omitted). Moreover, "Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Williams*, 529 U.S. at 404. Section 2254(d)(1) promotes these goals by "placing new constraint[s] on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus." *Garceau*, 538 U.S. at 206 (internal quotation marks omitted).

The Ninth Circuit ignored these constraints when it elevated its own decision in *Norris* to the body of "clearly established Federal law" against which state decisions are judged on federal habeas review. This was clear error. See, *e.g.*, *Chadwick v. Janecka*, 312 F.3d 597, 613 (3d Cir. 2002) ("federal courts may not grant habeas corpus relief based on the state court's failure

to adhere to the precedent of a lower federal court on an issue that the Supreme Court has not addressed") (internal quotation marks omitted), *cert. denied*, 538 U.S. 1000 (2003); *Bell v. Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) (*en banc*) ("a federal court may now grant habeas relief only if it determines that the state court decision is contrary to, or an unreasonable application of Supreme Court jurisprudence, and not circuit court precedent"), *cert. denied*, 534 U.S. 830 (2001); *Welch v. City of Pratt*, 214 F.3d 1219, 1223 (10th Cir. 2000) ("[W]hile the trial court's failure to give petitioner's requested . . . instruction may have violated Tenth Circuit law, it did not violate clearly established federal law as determined by the Supreme Court.").

B. State Courts Enjoy Substantial Latitude When Applying Supreme Court Precedent Setting Forth General Standards.

In cases like this one, where the governing precedent from this Court sets forth a general standard rather than a specific rule, federal habeas courts may not use lower court decisions to refine that standard further. On the contrary, state courts enjoy particular latitude when interpreting and applying such general standards. As this Court recently recognized,

> Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004); see also *Dunlap v. Hepp*, 436 F.3d 739, 744 (7th Cir. 2006) ("a very general rule allows for a good deal of leeway in reaching decisions").

The latitude that state courts enjoy diminishes only as this Court renders more specific holdings in later cases. But until that occurs, where "the Supreme Court has spoken only in general terms, . . . various outcomes may be reasonable applications of the Court's precedents" for habeas purposes. *Wade v. Herbert*, 391 F.3d 135, 145 (2d Cir. 2004); see generally *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous.").

This Court denied habeas relief in *Alvarado* precisely because the governing, "clearly established" law was a general standard defining "custody" for *Miranda* purposes. The Court recognized that "the custody test [was] general, and the state court's application of [Supreme Court] law" was reasonable because it "fit[] within the matrix of [the Court's] prior decisions." 541 U.S. at 665. Likewise, in *Kane v. Garcia Espitia*, 126 S. Ct. 407 (2005), the Court summarily reversed a Ninth Circuit decision granting habeas relief to a petitioner who asserted a constitutional right to law library access while representing himself at trial. The Court reasoned that its own case law established only the general right to self-representation, and concluded that because the decision establishing that right said "nothing about any specific legal aid that the State owes a *pro se* criminal defendant," habeas relief should have been denied.

Lockyer v. Andrade, *supra*, is to the same effect. The Ninth Circuit granted habeas relief, holding that the state courts had unreasonably applied precedent from this Court providing that a sentence could violate the Eighth Amendment if it was grossly disproportionate to the crime. 538 U.S. at 70. This Court reversed, reasoning that the governing Eighth Amendment standard was a general one: "[T]he only relevant clearly established law amenable to the 'contrary to' or 'unreasonable

application of' framework [was] the [Eighth Amendment's] gross disproportionality principle, the precise contours of which [were] unclear." *Id.* at 73. This meant that state courts had "broad discretion to fashion a sentence that fit[] within the proportionality principle," a discretion that the state court properly exercised in sustaining the sentence. *Id.* at 76.

Consistent with *Alvarado*, *Garcia Espitia* and *Andrade*, the courts of appeals have recognized the latitude that AEDPA affords the state courts when applying general standards set forth by this Court's precedents. See *Walker v. Litscher*, 421 F.3d 549, 557 (7th Cir. 2005) ("Confrontation Clause standards are very general, making it difficult to call a state court ruling in this area 'objectively unreasonable.'"), *cert. denied*, 126 S. Ct. 1095 (2006); *Serrano v. Fischer*, 412 F.3d 292, 300 (2d Cir. 2005) ("[W]here the governing rule remains so roughly defined, we are less likely to conclude that a given interpretation or application of Supreme Court law is 'contrary to' or an objectively 'unreasonable application of' Supreme Court precedent for purposes of § 2254(d)(1)."), *cert. denied*, 126 S. Ct. 1357 (2006); cf. *Holland v. McGinnis*, 963 F.2d 1044, 1054 (7th Cir. 1992) (in context of *Teague* bar on retroactive application of "new" rules on habeas review, recognizing that very general precedent does not compel particular outcome in subsequent case), *cert. denied*, 506 U.S. 1082 (1993).

The governing standard in this case—that due process prohibits an "unacceptable risk of impermissible factors coming into play" at trial—is general. The state appellate court correctly recognized this standard and diligently applied it to the particular facts of this case. However, rather than afford the state court the "leeway" required under the circumstances, *Yarborough*, 541 U.S. at 664, the Ninth Circuit erroneously imposed a more specific rule from its own case law. For the reasons stated above, the Ninth Circuit's approach cannot be reconciled with § 2254(d)(1).

II. Lower Court Opinions Have Limited Use in Determining Whether a State Court Unreasonably Applied Clearly Established Federal Law.

The Ninth Circuit not only raised its own decision in *Norris* to the level of "clearly established Federal law," but also took *Norris* as conclusively demonstrating that the state appellate court unreasonably applied this Court's precedents. This, too, was error.

Amici States do not contend that state and lower federal court decisions are categorically irrelevant when deciding whether a state court decision applied the holdings of this Court in an objectively unreasonable manner. Lower court opinions that are *consistent* with the challenged state court decision support, and in fact confirm, the reasonableness of the state court's judgment. Moreover, a substantial number of lower court opinions that are overwhelmingly and unanimously *inconsistent* with the state decision might possibly indicate that the decision was objectively unreasonable. But the Ninth Circuit's reliance in this case on a single court of appeals decision to conclude that the state appellate court's decision was objectively unreasonable is unfaithful to § 2254(d)(1).

Section 2254(d)(1) recognizes that more than one outcome will often be reasonable in a given case. By favoring "conventionalism over formalism," § 2254(d)(1) "takes for granted that for a given set of facts, there exists the possibility of several equally plausible outcomes." *Ward v. Sternes*, 334 F.3d 696, 703 (7th Cir. 2003). As noted above (pages 9-11, *supra*), this is especially true where the governing Supreme Court precedent sets forth general standards rather than specific rules. See *Alvarado*, 541 U.S. at 664 ("The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.").

A state court judgment fails the § 2254(d)(1) standard only if it falls outside the broad range of plausible outcomes allowed by existing Supreme Court case law. It is not enough that the federal habeas court find legal error in the state court decision. See *Andrade*, 538 U.S. at 75; see also *Brown v. Payton*, 544 U.S. 133, 143 (2005) ("Even on the assumption that the [state court's] conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review."). To exceed the range of permissible outcomes, the challenged decision must be "objectively unreasonable." *Andrade*, 538 U.S. at 75.

One way to establish the reasonableness of a state court decision is to show that other lower courts have reached the same conclusion in similar circumstances. This Court used federal and state decisions to this effect in *Price v. Vincent*, 538 U.S. 634 (2003). The petitioner in *Vincent* challenged a state supreme court decision rejecting his double jeopardy claim. To support its conclusion that the state supreme court did not apply federal law unreasonably, this Court explained that "numerous other [state and federal] courts [had] refused to find double jeopardy violations under similar circumstances." *Id.* at 643 & n.2; accord, *e.g.*, *Jackson v. Frank*, 348 F.3d 658, 665 (7th Cir. 2003) ("Although the only definitive source of clearly established federal law under the AEDPA is Supreme Court authority, . . . the determination by one of our sister circuits that a misstatement of state law alone does not vitiate a *Miranda* waiver certainly makes it more difficult to conclude that the Wisconsin Court of Appeals unreasonably applied Supreme Court authority."), *cert. denied*, 541 U.S. 963 (2004); *Williams v. Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003) ("the objective reasonableness of a state court's application of Supreme Court precedent may be established by showing other circuits having similarly applied the precedent"). Consistent decisions from

other courts are persuasive, if not conclusive, evidence that the challenged state court decision applied federal law reasonably.

The same result holds even if other courts have reached divergent results in applying the same Supreme Court precedents. In such instances, the disagreement itself suggests that this Court's precedents permit more than one objectively reasonable application. This was the situation in *Kane v. Garcia Espitia*, *supra*, which denied habeas relief with the observation that "[t]he federal courts [had] split" on the disputed question. 126 S. Ct. at 408; see also *Williams v. Bowersox*, 340 F.3d at 671 (recognizing that split in lower court authority "alone suggest[ed] the [state court] did not unreasonably apply" Supreme Court precedent).

An instructive parallel might be drawn to the principles governing whether a case announces a "new" rule under *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* asks whether a new decision was in fact compelled by preexisting law (in which case it did not announce a "new" rule), a question with obvious parallels to the inquiry under § 2254(d)(1), which asks whether preexisting Supreme Court holdings compelled a particular outcome in the challenged state proceeding. In the *Teague* context, a diversity of opinion among lower courts suggests that "reasonable minds" could disagree over the proper application of preexisting precedent, and therefore that such precedent did not dictate a particular outcome. See, *e.g.*, *Butler v. McKellar*, 494 U.S. 407, 415 (1990) (citing "difference of opinion on the part of several lower courts" and "different positions taken by [certain] judges" as evidence that a legal rule "was susceptible to debate among reasonable minds"). Likewise, in the § 2254(d)(1) context, when lower courts reach divergent results when applying the same Supreme Court holdings, the fact that some such courts are in accord with the challenged state decision suggests that the decision is not unreasonable.

The converse proposition does not hold, however, and this is where the Ninth Circuit went astray. A challenged state decision is not *unreasonable* merely because another court reaches a different conclusion on similar facts. This is particularly true where the habeas petitioner marshals only one lower court opinion (or a small number) favoring his position. For this one opinion to show that a contrary outcome was unreasonable, the opinion would have to be more than objectively reasonable in its own right; it would have to reflect the *only* reasonable application of "clearly established" Supreme Court precedent. See *Billings v. Polk*, 441 F.3d 238, 247 (4th Cir. 2006) (rejecting reliance on Ninth Circuit's decision in *Norris*, recognizing that "that decision is relevant to this habeas action only insofar as it would have been objectively unreasonable under Supreme Court precedent to reach a contrary conclusion"). Reasoning again by analogy to *Teague*, the fact that a new decision is consistent with a preexisting judicial consensus does not mean that it was compelled by precedent, and thus the *only* reasonable outcome. See *Taylor v. Gilmore*, 954 F.2d 441, 446 (7th Cir. 1992) ("[T]he absence of prior contrary decisions does not necessarily indicate that a later case was beyond dispute, and hence not a new rule."), *rev'd on other grounds*, 508 U.S. 333 (1993).

The standard for issuing a certificate of appealability (COA) in habeas proceedings provides another helpful illustration. To receive the COA needed to appeal an adverse district court ruling, a habeas petitioner must show that the district court's decision would be at least debatable among reasonable jurists. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This Court has recognized that a particular legal outcome would not necessarily be unreasonable even if *every* court would ultimately reject it. See *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003) ("Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been

granted and the case has received full consideration, that [the] petitioner will not prevail."). *A fortiori*, a legal position is not unreasonable merely because some small number of courts have rejected it.

The dissent from the denial of *en banc* review in this case recognized the fundamental difference between using consistent decisions from other courts to show that a challenged state court decision was reasonable, and using contrary decisions as proof that the decision was unreasonable: "[S]aying that the state court decision is not unreasonable because some federal courts have reached similar conclusions is not at all the same as saying that the state court decision is unreasonable because a circuit court has reached a contrary conclusion." Pet. App. 26a. The Ninth Circuit erred in ignoring this distinction and relying on a single circuit precedent to show that the California court applied this Court's case law unreasonably.

III. Under The Proper Standard, Musladin Was Not Entitled to Habeas Relief.

The state appellate court's decision in this case passes muster under § 2254(d)(1). The state court recognized that, under this Court's decision in *Holbrook v. Flynn*, *supra*, Musladin could prevail only if the buttons worn at his trial posed "an unacceptable risk . . . of impermissible factors coming into play." Pet. App. 74a (quoting *Woods*, 923 F.2d at 1457 (which in turn quoted *Flynn*, 475 U.S. at 570)). Even the Ninth Circuit agreed that this is the proper standard for showing "inherent prejudice" under Supreme Court case law. Pet. App. 7a.

The *Flynn* standard is set forth in general terms, and state courts therefore have substantial "leeway" to determine its reasonable application in specific cases. *Alvarado*, 541 U.S. at 664 ("The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations."). The

state appellate court acted reasonably in concluding that "[t]he simple photograph of [the victim] was unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of [a] family member" and therefore presented no inherent prejudice to Musladin. Pet. App. 75a.

Contrast this with the prison garb the habeas petitioner wore during his trial in *Estelle v. Williams*, *supra*. Quite unlike the buttons at issue here, jurors in *Williams* witnessed the "constant reminder of the accused's condition implicit in such distinctive, identifiable attire." 425 U.S. at 504-505. Prison-issue clothes "are unmistakable indications of the need to separate a defendant from the community at large." *Flynn*, 475 U.S. at 569; see also Pet. App. 22a (dissent from denial of rehearing *en banc*) (whereas "prison garb is an unambiguous statement that the defendant is already a prisoner" and "a communication to the jury of the government's determination . . . that the defendant belongs in jail," the buttons worn in Musladin's case "are ambiguous" and "do not imply any determination by the government"). It was not at all unreasonable for the state appellate court to conclude that buttons mourning a victim's passing communicate no similarly prejudicial message.

The reasonableness of the state appellate court's conclusin is confirmed by the fact that many lower courts have rejected similar challenges to the wearing of buttons bearing a deceased victim's likeness at trial. See, *e.g.*, *Cagle v. State*, 68 Ark. App. 248, 251, 6 S.W.3d 801, 803 (1999), *aff'd*, 2002 WL 31628432 (Ark. Nov. 21, 2002); *State v. Speed*, 265 Kan. 26, 47-48, 961 P.2d 13, 29-30 (1998); *State v. Bradford*, 254 Kan. 133, 141-142, 864 P.2d 680, 686-687 (1993) (rejecting defendant's reliance on *Norris*); *State v. Braxton*, 344 N.C. 702, 709-710, 477 S.E.2d 172, 176-177 (1996) (distinguishing *Norris*); *Nguyen v. State*, 977 S.W.2d 450, 457 (Tex. App. 1998) ("large buttons portraying a color photograph of the deceased"), *aff'd*, 1 S.W.3d 694 (Tex. Crim. App. 1999); *State v. Lord*, 128

Wash. App. 216, 114 P.3d 1241, 1243-1245 (2005) (rejecting defendant's reliance on *Norris*), *rev. granted*, 134 P.3d 233 (Wash. 2006); see also, *e.g.*, *Buckner v. State*, 714 So.2d 384, 388-389 (Fla. 1998) (*per curiam*) (photos of victim held up by family members in court); *State v. Nelson*, 705 So.2d 758, 763 (La. App. 1997) (t-shirts with photo of murder victim), *writ denied*, 720 So.2d 677 (La. 1998); *In re Woods*, 154 Wash. 2d 400, 416-418, 114 P.3d 607, 616-617 (2005) ("remembrance ribbons" worn by victim's family) (distinguishing *Norris*). As the Supreme Court of Washington summarized, "[m]any courts have used the [*Flynn*] standard and have found that no inherent prejudice exists so as to taint the defendant's right to fair trial from the wearing of buttons or other displays." *Woods*, 154 Wash. 2d at 418, 114 P.3d at 617.

These decisions—not one of which the Ninth Circuit mentioned, let alone addressed, in this case—are powerful evidence that the state appellate court applied "clearly established Federal law" reasonably. Even if *Norris* were factually similar to this case (and it is not), in combination with the foregoing decisions it would merely illustrate just how general and open to conflicting application the governing "Federal law" is. The mere presence of *Norris* in the constellation of lower court decisions applying *Williams* and *Flynn* does not even remotely suggest, let alone establish, that the state appellate court applied this Court's holdings unreasonably.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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